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Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD FUSARO,
individually,

Petitioner,

vs.

HIALEAH HOUSING AUTHORITY,
a political subdivision of the City of Hialeah, Florida,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Eleventh Circuit's decision affirming the district court's summary final judgment in this age discrimination case, conflicts with this Court's precedent that a plaintiff's *prima facie* case, combined with sufficient evidence to find that an employer's asserted justification for his termination is false, may permit the trier of fact to conclude that the employer unlawfully discriminated against the employee?

Whether the evidentiary standard established in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000), applies equally to claims based on national origin discrimination and retaliation, where a plaintiff's *prima facie* case, combined with sufficient evidence to find that an employer's asserted justification for his termination is false, may permit the trier of fact to conclude that the employer unlawfully discriminated against the employee based on his national origin, and retaliated against the employee based on the exercise of his First Amendment rights?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Richard Fusaro, petitioner herein and appellant/plaintiff below, and the Hialeah Housing Authority, a political subdivision of the City of Hialeah, Florida, respondent herein and appellee/defendant below. Hugo Hernandez, also an appellant/plaintiff below, and Maria M. Roca, also an appellee/defendant below, are not parties to the instant proceeding. Roberto Jimenez, appellant/plaintiff below, is filing a separate petition in this proceeding.

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The evidentiary standard established in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000), should apply equally to claims based on national origin discrimination and retaliation, where a plaintiff's *prima facie* case, combined with sufficient evidence to find that an employer's asserted justification for termination is false, may permit the trier of fact to conclude that the employer unlawfully discriminated against the employee

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Fusaro ("Fusaro"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"), in the case of *Richard Fusaro, Hugo Hernandez and Roberto Jimenez v. Hialeah Housing Authority, a political subdivision of the City of Hialeah, and Maria Roca, an individual*, Case No: 99-4155, as that judgment pertains to Fusaro's claims based on age, and national origin discrimination, and retaliation based on the exercise of his First Amendment rights.

OPINIONS BELOW

The Eleventh Circuit's decision, which was filed with an opinion on August 16, 2000, is not reported.

The Eleventh Circuit affirmed the district court's order granting respondent's motion for summary judgment and supplemental motion for summary judgment and dismissing all of petitioner's claims. The decision of the district court is reported at 33 F.Supp.2d 1354, and appears in the Appendix at pages 24a-43a.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was rendered final on March 8, 2001 when the Eleventh Circuit denied Fusaro's Petition(s) for Rehearing and Petition(s) for Rehearing *En Banc*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution (emphasis supplied):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section 1, United States Constitution (emphasis supplied):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny any person within its jurisdiction the equal protection of the laws.

Age Discrimination in Employment Act, 29 U.S.C. § 6239(a)(1):

> [It is] unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age.

Civil Rights, Equal Employment Opportunities, 42 U.S.C. § 2000e-2(a)(1) (emphasis supplied):

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or *national origin*.

Civil Rights, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Florida Civil Rights Act of 1982, Florida Statutes § 760.01 (emphasis supplied):

> [A]ll individuals within the state [shall be] free[ ] from discrimination because of race, color, religion, sex, *national origin*, *age*, handicap, or marital status.

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STATEMENT OF THE CASE

The fundamental questions in this case are (1) whether the decision of the Eleventh Circuit affirming the district court's grant of summary final judgment to Respondent (the "Authority"), and dismissing Fusaro's claim for age discrimination, directly conflicts with this Court's precedent established in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000); and (2) whether the *Reeves* standard applies equally to national origin and retaliation claims, where Fusaro's *prima facie* case, combined with sufficient evidence to find that the Authority's asserted justification for his termination is false, may permit the trier of fact to conclude that the Authority unlawfully discriminated against Fusaro based on his national origin, and retaliated against him based on the exercise of his First Amendment rights?

Fusaro, a former Acting Director of the Authority, a seventeen-year public employee with an impeccable work record, and a whistleblower who had contacted the FBI to expose corruption and graft at the Authority, was a litigant under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"); the national origin provisions of Title VII, 42 U.S.C. 2000e, *et seq.*; the procedural and substantive due process clauses of the Fourteenth Amendment; the First Amendment's guarantee of free speech; 42 U.S.C. § 1983; the Florida Civil Rights Act, Florida Statutes § 760.01 ("FCRA"); and other state and federal statutes. The original jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331. The district court granted summary final judgment to the Authority dismissing all of Fusaro's claims.

Fusaro timely appealed the summary final judgment to the Eleventh Circuit. The Eleventh Circuit affirmed the district court's grant of summary final judgment.

Believing that the Eleventh Circuit had misapplied this Court's evidentiary standard set down in *Reeves*, Fusaro sought rehearing and rehearing *en banc* of the Eleventh Circuit's decision, which applications were denied.

REASONS FOR GRANTING THE WRIT

In affirming the district court's grant of summary final judgment that dismissed all of Fusaro's claims against the Authority – including his age, national origin and retaliation claims – the Eleventh Circuit applied a pretext-plus standard that was expressly rejected in *Reeves*. In *Reeves*, this Court found that the United States Court of Appeals for the Fifth Circuit had erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination to overcome an employer's alleged non-discriminatory reasons for termination.

In granting summary final judgment *sub judice*, the district court stated, "Because the plaintiff bears the burden of establishing pretext, he must present 'significantly probative evidence on the issue to avoid summary judgment[ ]' " [*citing Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 444 (11th Cir. 1996), *cert. den.*, 117 S. Ct. 2511 (1997)] (App. 28a). The district court further

held, "That a plaintiff calls into question some assertions by defendant in support of defendant's justification is not enough; a plaintiff must call into question the veracity of defendant's ultimate justification itself." (App. 28a-29a). While noting that Fusaro had made out a *prima facie* case of "national origin and age discrimination and retaliation" (App. 29a-30a), the district court found that Fusaro offered no additional evidence "to show that the Authority's reason for terminating his employment was simply a pretext for intentional discrimination." (App. 30a). In other words, that the evidence comprising Fusaro's *prima facie* case "cannot be used to rebut the Authority's legitimate non-discriminatory reason for his termination." *Id.*

The district court's pronouncement expressly conflicts with *Reeves*, where this Court held, "a plaintiff's *prima facie* case [of age discrimination], combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated against the employee." 530 U.S. at 148, 120 S. Ct. at 2109. Accordingly, the fact-finder's disbelief of the reasons put forward by the defendant, together with the elements of the *prima facie* case, may suffice to show intentional discrimination.

In *Reeves*, this Court also stated, "Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination. Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive." 530 U.S. at 147, 120 S. Ct. at 2108 (internal citations omitted).

It is manifest that the district court's order granting summary final judgment to the Authority and dismissing Fusaro's age discrimination claim – and by extension his national origin and retaliation claims – directly conflicts with *Reeves*, because it applies a pretext-plus standard requiring that a plaintiff must introduce additional independent evidence of discrimination to overcome summary judgment, an impossibly high standard this Court has expressly rejected.

Accordingly, the Eleventh Circuit's decision affirming the district court's grant of summary final judgment to the Authority, directly conflicts with this Court's decision in *Reeves*. As a result, this case presents questions of significant importance – whether the Eleventh Circuit's decision affirming the district court's grant of summary final judgment to the Authority and dismissing Fusaro's age, national origin and retaliation claims – conflicts with precedent in this Court that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated" against the employee. 530 U.S. at 148, 120 S. Ct. at 2109.

CONCLUSION

Fusaro respectfully requests that this Court grant this petition for writ of certiorari to review the merits of the Eleventh Circuit's decision below..

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4155

D. C. Docket No. 97-2732-CV-KMM

RICHARD FUSARO, HUGO HERNANDEZ,
ROBERTO JIMENEZ

Plaintiffs-Appellants,

versus

THE HIALEAH HOUSING AUTHORITY,
a political subdivision of the City
of Hialeah, MARIA ROCA, an individual,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(August 16, 2000)

Before EDMONDSON, BARKETT and RONEY, Circuit Judges.

PER CURIAM:

Plaintiffs brought suit against Defendants, Hialeah Housing Authority and Supervisor Roca, alleging unlawful employment discrimination and retaliation. The district court granted summary judgment for Defendants. We affirm.

BACKGROUND

Three Plaintiffs, all of whom were employed, and subsequently terminated, by the Hialeah Housing Authority ("Defendant Authority" or "Authority"),[1] bring claims in this case, Plaintiffs are Richard Fusaro, Hugo Hernandez, and Roberto Jimenez.

Plaintiff Fusaro, a 61 year-old white male, had been employed by the Authority since 1980 and had held the position of Director of Operations for thirteen years. In March 1994, Fusaro initiated contact with federal agents, including the FBI, who were investigating allegations of mismanagement and corruption by then-Executive Director, Rafael Sanchez. The federal investigation, which included HUD and in which Fusaro participated, resulted in the removal of Sanchez in November 1995. The Authority's Board appointed Fusaro as Acting Executive Director in temporary replacement of Sanchez.

The day after Fusaro was appointed Acting Executive Director, Ruth Tinsman, the Chairman of the Board, sent him a memo. The memo said that, in the light of the investigation and upheaval at the Authority, Fusaro should not take certain acts (such a hiring, firing, or raising salaries of employees) without first discussing the changes with her. Nevertheless, Fusaro directed the Finance Director to increase the salaries of all the maintenance department employees and rehired a former employee in partial settlement for a charge that employee

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[1] The Authority is a federally subsidized municipal agency whose work is overseen by a five-person Board of Commissioners ("the Board").

had pending before the EEOC. Fusaro also increased the application fees of the affordable housing units. In addition, Fusaro admits to calling Tinsman "dumb as dirt." As a result, Tinsman, at a Board meeting, asked that Fusaro be removed as Acting Executive Director. In January, the Board decided to allow his sixty-day term to expire; and when it did, the Board appointed Defendant Roca to be Acting Executive Director.[2]

Fusaro was placed back into his position as Director of Operations. Fusaro claims at this point Roca began to retaliate against him.[3] On 20 March 1996, Roca reprimanded Fusaro for leaving work without informing her. She later informed him that similar incidents had occurred before on 15 and 26 February 1996.[4] On 25 March 1996, Roca suspended Fusaro for five days without pay for authorizing overtime in a nonemergency situation without Roca's approval. Roca had already advised him, five days earlier, not to authorize overtime without her approval. Then on 11 June 1996, Roca sent a memo to

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[2] Roca had earlier been on the Board, in December 1995, but was forced to resign when Fusaro pointed out that under Authority's charter a Board member could not also be a city employee.

[3] And Fusaro – with no detail – claims Roca cut his job responsibilities, yet he admits that Sanchez had already reduced his duties in 1995-96.

[4] In November 1995, Fusaro had been reprimanded by Sanchez for mishandling a project and acting unprofessionally before the Board. The memo warned that Fusaro would be terminated if he did not improve. Fusaro could not point to anything that was false in Sanchez's memo. Fusaro said it "[j]ust colored and slanted a little bit differently than what I probably would have liked it to be written."

Fusaro informing him that the Board was dissatisfied with the way certain bid packages had been prepared by Fusaro: a form had been omitted which forced the Board to reject all submitted bids. Further errors occurred with the bids; in one case, HUD informed the Authority that it had failed properly to advertise bid solicitations in two publications as required.

On 12 November 1996, Roca informed Fusaro that because of the continued problems she was then terminating his employment. And in December 1996, Roca was appointed permanent Executive Director.[5]

Jimenez, a 59 year-old Hispanic male, had been working for the Authority for twenty-one years and was Director of Maintenance, in charge of the public housing warehouse. And Hernandez, a 56 year-old Hispanic male, had been working for the Authority for thirteen years and worked in the public housing warehouse under Jimenez's supervision. In January 1996, over fifty employees, including Jimenez and Hernandez, signed a letter to HUD; they say the letter protested corruption and mismanagement at the Authority and the discriminatory treatment of Fusaro.

In April 1996, the Authority conducted its own internal inventory of the warehouses. Defendants say the inventory identified a series of problems in the public

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[5] The Board conducted a search for Executive Director. Fusaro claims this search was meritless because one of the qualifications was that the person speak Spanish, which Fusaro claims was just meant to keep him from qualifying.

housing warehouse. Roca forwarded this report to Jimenez telling him to correct the problems. Jimenez responded that these problems would be corrected.[6]

Then in November 1996, an outside independent audit was conducted of the maintenance department, including the public housing warehouse. Jimenez was out on vacation (on leave which had been approved by Roca), and Hernandez had been left in charge of the warehouse in Jimenez's absence. The Authority provided Hernandez with written instructions on the procedures for the inventory. On 21 November the auditors issued their report which said that the public housing warehouse was in poor condition and that items were not properly inventoried. Roca fired Hernandez for his handling of the November inventory. Roca fired Jimenez for the condition of the warehouse and its effect on the November audit.[7]

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[6] About the April 1996 memo, Jimenez assured Roca that work order back-ups would be addressed. But for the November audit Hernandez asserted that he needed two weeks to prepare because the work orders were backed-up. Moreover, Jimenez had been warned about these problems before: in 1995, Sanchez had sent a memo to Jimenez criticizing his performance, including his supervision of the maintenance department, and warned that failure to improve would result in his termination.

[7] In the termination letter, Roca wrote that Hernandez's failure to follow inventory procedures resulted in a four-day delay in counting the inventory and caused many delays in the daily operation of the facility. Roca stated that Jimenez's failure to maintain the inventory in the warehouse and account for it in the computer system made the inventory records less accurate and reliable, therefore making it difficult to account for the use of federal funds.

DISCUSSION

Based on the circumstances, Plaintiffs brought suit against Defendants under Title VII, section 1983, and the Florida Civil Rights Act alleging employment discrimination. The district court granted summary judgment for Defendants. We review the district court's grant of summary judgment de novo. *See Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir. 1999)

I.

A.

Plaintiffs Jimenez and Hernandez allege that Defendants, in violation of Title VII and the ADEA, retaliated against them for "opposing" the discriminatory removal of Plaintiff Fusaro from his position as Acting Executive Director and the replacement of Fasuro by a younger Hispanic woman. Because Plaintiffs failed to show that they engaged in statutorily protected conduct within the meaning of the Acts, their retaliation claims fail.

Title VII provides that it shall be unlawful for an employer to discriminate against any employee "because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 200e-3(a). And the ADEA contains a similar provision making it unlawful for an employer to discriminate against an employee "because such individual . . . has opposed any practice made unlawful by this section." 29 U.S.C. § 623(d). To establish a prima facie case for retaliation, Plaintiffs must show (1) statutorily protected expression, that is, expression opposed to discrimination; (2) an

adverse employment action; and (3) a causal link between the protected expression and the adverse action. *See Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997).

To satisfy the first element, Plaintiffs must be protesting that their employer engaged in discrimination made unlawful by the statute. *See Coutu v. Martin County Bd. of Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995). And Plaintiffs have failed to establish the first element of their prima facie case if they cannot show that their protest letter constituted statutorily protected activity. *See id.* (concluding grievance did not constitute statutorily protected activity when it did not protest discrimination made unlawful by Title VII).[8]

The pertinent letter makes no reference to age or national origin: the letter mentions only that Fusaro is

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[8] This reasoning applies equally to the claims under Title VII, ADEA, and the Florida Civil Rights Act ("FCRA"). *See Maniccia v. Brown*, 171 F.3d 1364, 1368 n.2 (11th Cir. 1999) ("Florida's Civil Rights Act is patterned after Title VII, and thus federal case law dealing with Title VII is applicable to employment discrimination claims brought under Florida law."); *Zaben v. Air Products & Chemicals, Inc.*, 129 F.3d 1453, 1455 n.2 (11th Cir. 1997) ("Age discrimination claims brought under the Florida Civil Rights Act have been considered within the same framework used to decide actions brought pursuant to the ADEA.") (per curiam); *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 919 (11th Cir. 1993) ("The Eleventh Circuit has adapted to issues of age discrimination the principles of law applicable to cases arising under the very similar provisions of Title VII."); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998) (evaluating Title VII and ADEA retaliation claims under same standard).

under personal attack by the Mayor and his friends who are trying to cover up abuse of power and manipulation by the prior Executive Director; that a political power struggle is occurring; and that, if HUD investigates, it will find evidence to support corruption at the housing authority.[9] Corruption, political favoritism and mismanagement, however, are not unlawful under Title VII or the ADEA. *See Coutu*, 47 F.3d at 1074 ("Unfair treatment, absent discrimination based on race, sex, or national origin is *not* an unlawful employment practice under Title VII."); *see also Aldridge v. Tougaloo College*, 847 F. Supp. 480, 484-86 (S.D. Miss. 1994) (concluding plaintiff did not engaged [sic] in statutorily protected activity where grievance letter made no mention of sex discrimination).

Therefore, Plaintiffs' statutory retaliation claim fails because Plaintiffs have produced insufficient evidence to show the letter constituted statutorily protected activity.[10]

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[9] Here, Plaintiffs Jimenez and Hernandez allege that, when signing the letter of protest, they had a good faith belief that Fusaro was the subject of national origin and age discrimination. Even if this statement might be sufficient to establish a subjective good faith belief that they were engaging in protected expression, Plaintiffs' belief was not objectively reasonable.

[10] For similar reasons, Plaintiff Fusaro's Title VII and ADEA retaliation claims fail. Plaintiff Fusaro alleges that he participated in an FBI/HUD investigation of corruption and mismanagement at the Authority and that he protested the corruption of his supervisor. These government-misconduct activities are also not ones made unlawful by Title VII or the ADEA. Plaintiff Fusaro says, for the first time in his reply brief, that he complained to the Board and fellow employees of age and national origin discrimination. The record does not support this assertion. As Fusaro himself stated, he never informed Roca

The district court properly granted summary judgment against Plaintiffs on their Title VII and ADEA retaliation claims.

Plaintiffs also allege that Defendants unlawfully retaliated against them for the exercise of their First Amendment speech rights in violation of section 1983. Plaintiffs say that the district court erred in granting summary judgment for Defendants on their section 1983 speech retaliation claims on the basis of qualified immunity. We disagree; the district court properly determined that Defendants were entitled to qualified immunity.[11]

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or the Board of discrimination against him; and he had not told the employees at the Authority, specifically about discrimination. Plaintiff Fusaro's Title VII and ADEA retaliation claims also fail.

[11] The district court granted summary judgment to the Authority (independent of Roca – summary judgment had already been granted to her on the basis of qualified immunity) on Plaintiffs' First Amendment retaliation claims on the basis of Plaintiffs' failure to show custom or policy. Both parties, in their briefs on appeal, argue the Authority's liability on these claims in terms of "custom" and "policy." Therefore, we do not address the question of whether custom or policy must be shown where the Defendant is a local government entity and the act giving rise to the alleged liability is a formal act of the policymaking body of that entity.

And Plaintiffs do not argue, on appeal, that the board would be directly liable (without a showing of custom or policy), that the district court applied the wrong standard, or that they have shown custom to hold the Board liable. *See Scala v. City of Winter Park*, 116 F.3d 1396, 1399 (11th Cir. 1997) (stating respondent superior does not apply, municipalities may only be held liable under policy or custom). Therefore, Plaintiffs have, in effect, waived or abandoned their section 1983 claims against Defendant Authority. *See Marck v. Singletary*, 62 F.3d 1295, 1298

In determining whether a defendant is entitled to qualified immunity, a court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 119 S. Ct. 1692, 1697 (1999) (citations and quotations omitted). And clearly established law means that the law "must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Lassiter v. Alabama A&M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994).

Therefore, we first assess whether Plaintiffs have sufficiently shown a violation of a constitutional right. *See GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998) (noting that if plaintiff fails to allege sufficiently the violation of constitutional right, then plaintiff has also failed to allege violation of clearly established right). To prove that a state employer has unlawfully retaliated against him for exercising his First Amendment free speech rights, a plaintiff must show, by a preponderance of the evidence, that:

> (1) the employee's speech is on a matter of public concern; (2) the employee's first amendment interest in engaging in the speech outweighs the employer's interest in prohibiting the speech in order to promote the efficiency of the public services it performs through its

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n.2 (11th Cir. 1995) ("Issues not clearly raised in the briefs are considered abandoned.").

> employees; (3) the employee's speech played a "substantial part" in the employer's decision to demote or discharge the employee.

Stanley v. City of Dalton, ___ F.3d ___ (11th Cir. 2000) (quoting *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989)).

Plaintiff Fusaro claims he was retaliated against for his cooperation with the FBI investigator; Plaintiffs Herandez and Jimenez claim they experienced retaliation for signing the letter to HUD delineating corruption and mismanagement at the Authority. We accept that Plaintiffs have presented sufficient evidence at this stage to allege a violation of a constitutional right.

To defeat Defendant's claim of qualified immunity, however, Plaintiffs "still must demonstrate that a reasonable [employer] would know that terminating [an employee] in these factual circumstances violated clearly established law." *Stanley*, ___ F.3d at ___. And, given the circumstances of this case, the *Mt. Healthy* doctrine bears on the question of clearly established preexisting law. *See generally, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 97 S. Ct. 568, 576 (1977).

Defendant Roca has shown that she was motivated, at least in part, by nondiscriminatory (lawful) motivations. In a mixed-motives case such as this one, we have said that a defendant is entitled to qualified immunity "[w]here the facts assumed for summary judgment purposes in a case involving qualified immunity show mixed motives (lawful and unlawful motivations) and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor, the defendant is entitled to

immunity." *Foy v. Holston*, 94 F.3d 1528, 1535 (11th Cir. 1996). Therefore, under *Foy*, a defendant can be entitled to qualified immunity "where, among other things, the record undisputably establishes that the defendant in fact was motivated, at least in part, by lawful considerations." *Stanley*, ___ F.3d at ___.

For Fusaro's termination, the record shows that he admitted to deficiencies in the bidding process and to granting overtime when expressly warned not to do so (a kind of offense for which he had been previously disciplined.)[12] Based on this record, we can say that no genuine issue of fact exists on these points: objectively valid reasons existed for Roca's decision to terminate Fusaro's employment; these reasons were, at least, significant contributory causes of the termination of his employment, and Roca was motivated, at least in part, by lawful considerations. Under *Foy*, defendant is entitled to qualified immunity where the record establishes that defendant

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[12] Plaintiff Fusaro claims he had approved overtime in the past. We find this argument unavailing, because Roca was his new supervisor. *See Jones v. Bessemer Carrway Med. Ctr.*, 137 F.3d 1306, 1312 n.7 (11th Cir. 1998) (noting that different management styles does not necessarily indicate discrimination). And we note that the policies of the Housing Authority only state: supervisors may authorize or direct overtime in emergency situations.

And Fusaro argues that Defendant has not shown that these mistakes warranted termination. But we do not sit in judgment of an employer's business decisions. *See Damon v. Flemin Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999) (noting that court is not concerned with whether employment decision was prudent or fair, but whether it was motivated by unlawful discriminatory animus).

was in fact motivated, in substantial part, by lawful considerations and where, given mixed motives, the preexisting law is not plain that the pertinent dismissal is unlawful. *See Stanley*, ___ F.3d ___. Therefore, Defendant Roca is entitled to qualified immunity on Plaintiff Fusaro's claim.

We reach the same conclusion for Hernandez's and Jimenez's claims. On this record, no genuine issue of fact exists for this point: valid reasons were, at least, significant contributing causes for the termination of their employment. Jimenez had been warned on two earlier occasions about the poor state of the warehouse he oversaw. Defendant Roca has consistently sworn that she decided to terminate Jimenez and Hernandez because of the independent auditors' report about the errors in the inventory at the warehouse. And this record, as a matter of law, compels the proposition that Defendant Roca was motivated, in substantial part, by lawful motives in terminating them for these problems.

C.

Plaintiff Fusaro also claimed discrimination under Title VII on the basis of national origin and under the ADEA on the basis of age when his appointment as Acting Executive Director was allowed to expire, when the Authority failed to hire him as Executive Director, and when he was fired from his position as Director of Operations. Because Plaintiff Fusaro has failed to offer sufficient evidence of pretext, we affirm the district court's grant of summary judgment on these claims.

To establish a prima facie case of disparate treatment, under the *McDonnell Douglas* framework, a plaintiff must show that he was (1) a member of a protected group, (2) subject to adverse employment action, (3) qualified, and (4) replaced by someone outside the protected group. Once these elements have been shown, the burden shifts to the defendant to produce evidence of legitimate non-discriminatory reason for the employment action.[13] To survive summary judgment, plaintiff must then present evidence to show "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves v. Sanderson Plumbing Prods. Inc.*, 120 S. Ct. 2097, 2106 (2000).

Assuming Plaintiff has established his prima facie case, he has failed to show pretext for Defendants' proffered legitimate nondiscriminatory reasons. First, Plaintiff Fusaro did not meet the qualifications for the Executive Director position (which he admits); the position as advertised, according to Fusaro's brief, required fluency in Spanish, which Fusaro admits he can not speak. And Fusaro has failed to show that this qualification is merely pretext for discrimination. Second, Fusaro's appointment as Acting Executive Director was not

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[13] The prima facie case under the ADEA defines protected group: plaintiffs must show "(1) that she was a member of the protected group of persons between the ages of forty and seventy; (2) that she was subject to adverse employment action; (3) that a substantially younger person filled the position that she sought or from which she was discharged; and (4) that she was qualified to do the job for which she was rejected." *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999).

renewed because he insulted a board member (which he admits) and violated Board policies by approving raises and rehired an employee without consulting the Chairman of the Board (which he admits). And third, Fusaro was terminated for authorizing overtime after being warned that to do so again without Roca's approval would warrant termination (which he admits) and for admittedly making mistakes in the bid packages. For termination and nonrenewal, Fusaro has presented no evidence beyond his own consulory allegations to discredit these proffered legitimate reasons. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997) ("[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.").

Fusaro argues discrimination based mainly on his own belief that the Board's and Roca's policies were invalid, and this argument is insufficient. *See Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999) (noting that court is not concerned with whether employment decision was prudent or fair but whether it was motivated by unlawful discriminatory animus).[14] In this case, Fusaro has failed to show pretext

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[14] Plaintiff also cites as evidence of discrimination the allegation that, at the time he was terminated, the Defendant Authority employed about 125 persons, only four or five of whom were non-Hispanic. Even if true, mere recitation of numbers without more is not sufficient. *See Brown v. American Honda Motor Co.*, 939 F.2d 946, 952-53 (11th Cir. 1992) (stating that statistics without analytic foundation are "virtually meaningless").

on Defendants' proffered legitimate nondiscriminatory reasons for their acts. Therefore, we affirm the district court's grant of summary judgment on this claim.

D.

Plaintiffs Jimenez and Hernandez claim discrimination in violation of the ADEA on the basis of age when they were terminated from their employment with the Authority. Because Plaintiffs have presented insufficient evidence to show pretext, we affirm the district court's grant of summary judgment on these claims.

In this case, Defendant proffered legitimate nondiscriminatory reasons for firing both Plaintiffs Jimenez and Hernandez: the poor condition of the warehouse and poor performance on the inventory. Neither disputes the accuracy of the independent audit or the state of the warehouse. Plaintiffs argue that the following evidence shows that Defendants' proffered legitimate reason was pretext: the usual two weeks' notice of an audit was not given, the audit was in November – during Jimenez's vacation (about which he had informed Roca) – instead of in December when it had been in the past.

Plaintiffs have failed to present sufficient evidence to show pretext. No evidence shows that the Authority's other warehouse had notice of the audit: Plaintiffs proffered the statements of Plaintiff Hernandez that other employees told him the other warehouse had been given advanced notice. Reference, however, to unidentified hearsay witnesses is insufficient evidence to survive summary judgment. *See Pritchard v. Southern Co. Servs.*, 92 F.3d 1130, 1135 (11th Cir. 1996) (stating that inadmissible

hearsay cannot be used to defeat summary judgment when nothing indicates it could be reduced to admissible evidence at trial). Defendants testified – without contradiction – that the outside auditor decided when to come and that Defendants did not have advanced notice of it. Plaintiffs basically claim that the inventory of the warehouse was a set-up to create reason to fire them; this conclusory allegation is unsupported by evidence in the record. *Carter*, 870 F.2d at 585 ("Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [an employer] has offered . . . extensive evidence of legitimate, nondiscriminatory reasons for its action.")[15] Plaintiffs have failed to show pretext.[16]

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[15] Hernandez claims that he has also shown pretext because, he says, Defendant Roca gave inconsistent reasons for his termination. The record shows the "Memorandum of Termination" stated that due to failure to follow inventory procedures and failure to call in sick he was being terminated. Defendant Roca's deposition is not inconsistent: she merely stated that the errors in the inventory were the reason for his termination (which she has consistently stated). Thus, this evidence is insufficient to establish pretext. *See Tidwell v. Carter Prods.*, 135 F.3d 1422, 1428 (11th Cir. 1998) ("[T]he existence of a possible additional non-discriminatory basis for [plaintiff]'s termination does not, however, prove pretext.").

[16] After Plaintiffs Hernandez's and Jimenez's employment ended they received post-termination letters which explained their rights to continue their health care benefits under COBRA. The letters carried the date 5 November which is a day that preceded their termination by about 20 days. Plaintiffs rely on the date on the letters to show pretext. Defendants point out that the letters are actually put together by a clerical employee who is not a party to the suit. Defendant Roca did not see the letters before they went out; the clerical employee initialed the

Therefore, we affirm the district court's grant of summary judgment for Defendants on Plaintiffs Title VII, ADEA, section 1983, and FCRA claims.[17]

II.

Plaintiffs also brought procedural due process claims.[18] Because Plaintiffs have failed to show that the

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letters for Roca's assistant, Prendes, who also stated that he had not seen the letters before. Defendants contend that the date is no more than a clerical error, probably made in typing the date. No evidence indicates how long the letters had been in existence before Plaintiffs received them (the evidence does show that Plaintiff Hernandez received his letter by certified mail on 6 December). No evidence indicates that Roca – who fired these Plaintiffs – directed that the letter be drawn up before the day she fired them. The dates on the letter are at most a scintilla of evidence for pretext. And in the context of this record, a scintilla is not enough. *See Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989) (stating "that a mere scintilla of evidence does not create a jury question").

[17] The district court dismissed Plaintiffs' Florida Civil Rights Act ("FCRA") claims for failure to exhaust administrative remedies. We need not address this issue. FCRA has been interpreted similarly to federal statutes. And to the extend that we grant summary judgment for Defendants on the federal claims, summary judgment is also appropriate for the FCRA claims as well. *See Bogle v. Orange County Bd. of County Commissioners*, 162 F.3d 653, 659 n.9 (11th Cir. 1998) (concluding unnecessary to discuss Florida state civil rights claim since court had determined that federal claims were without merit and "since Florida's human rights law is modeled after federal law, federal case law interpreting discrimination claims applies").

[18] Plaintiffs argue that the district court dismissed this claim for failure to exhaust state remedies. If this is so, this

state does not provide an adequate remedy to address their grievances, we affirm the district court's dismissal of these claims.

To show a procedural due process violation, plaintiff must show that the state fails to provide adequate procedures to remedy the alleged procedural deprivation of a protected interest. *See McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc).[19] In this case, when Plaintiffs were terminated, each one was provided with a letter explaining the reasons for their termination and stating that grievance procedures provided by the Authority were available. The procedures include filing a grievance with the employee's supervisor, then with the Executive Director, and then the Board of Commissioners. Plaintiffs

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reasoning was error. *See McKinney v. Pate*, 20 F.3d 1550, 1564 n.20 (11th Cir. 1994) (en banc) (noting that it was not creating an exhaustion requirement for procedural due process claims). We can affirm the grant of summary judgment on any grounds, however, and do so for these claims. *See Church of Scientology v. Cazares*, 638 F.2d 1272, 1281 (5th Cir. 1981).

But if adequate state remedies are available, Plaintiffs cannot rely on their failure to avail themselves of these remedies to show a deprivation of due process. *See McKinney*, 20 F.3d at 1565.

[19] Prior to an adverse job action, a public employee, with a property interest in his job, " 'is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.' " *McKinney*, 20 F.3d at 1561 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1495 (1985)). We assume for the sake of discussion, without deciding, that Plaintiffs had a property interest in their continued employment.

claim the grievance procedures provided were inadequate, in that they were not afforded a meaningful hearing, and that appeal to the state courts is not available for the termination of a municipal employee.

Even assuming the Authority's grievance procedures were inadequate, we have said that "the process a state provides is not only that employed by the board, agency, or other governmental entity whose action is in question, but also includes the remedial process state courts would provide if asked." *Horton v. Board of County Com'rs of Flagler County*, 202 F.3d 1297, 1300 (11th Cir. 2000).[20] Therefore, if an adequate remedy might be obtained in Florida state court, Plaintiffs' procedural due process claims must fail.

Either through mandamus or certiorri, *see DeNigris v. City of Fort Lauderdale*, 518 So.2d 469, 470 (Fla. Dist. Ct. App. 1988) (noting that board employment decision is reviewable either through certiorari if no prior hearing was had and not required, or through mandamus if hearing was required and not given), we believe an adequate remedy is available under state law to ensure Plaintiffs' due process rights.[21] Plaintiffs have failed to show that

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[20] And, the state procedure need not provide the exact relief available through section 1983 to be adequate. *See McKinney*, 20 F.3d at 1564.

[21] *See, e.g., Jackson v. City of Columbus*, 194 F.3d 737, 751 (6th Cir. 1999) (noting that mandamus is adequate remedy); *Collver v. Darling*, 98 F.3d 211, 227 (6th Cir. 1996) (same); *McKinney*, 20 F.3d at 1563 (certiorari is adequate remedy under Florida law); *See also Elder v. Highlands County Bd. of County Comm'rs*, 497 So. 2d 1334, 1335 (Fla. Dist. Ct. App. 1986) (reviewing employees section 1983 claim of denial of due process in firing from county position).

the state procedures provided in this case are insufficient.[22] We affirm the district court's dismissal of Plaintiffs' procedural due process claim.

CONCLUSION

Plaintiffs have failed to establish their discrimination claims. The judgment of the district court granting summary judgment for Defendants is AFFIRMED.

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[22] Plaintiffs also argue that appeal to the Executive Director and the Board would have been futile because these were the very entities which fired them. But allegations of bias do not render the process provided insufficient, if the state provides a means to remedy the deprivation with some manner of later review, including in the state courts. *See McKinney*, 20 F.3d at 1563.

APPENDIX B

United States Court of Appeals
For the Eleventh Circuit

No. 99-4155

District Court Docket No. 97-2732-CV

RICHARD FUSARO, HUGO HERNANDEZ, ROBERTO, JIMENEZ,

Plaintiffs-Appellants,

versus

THE HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah, MARIA ROCA, an individual,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

Before EDMONDSON, BARKETT and RONEY, Circuit Judges.

JUDGMENT

(Filed Aug. 16, 2000)

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same are hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the plaintiffs-appellants pay to the defendants-appellees, the costs on appeal to be taxed in accordance with Fed.R.App.P. 39.

Entered: August 16, 2000
For the Court: Thomas K. Kahn,
Clerk
By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: MAR 21 2001

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 97-2732-CIV-MOORE

RICHARD FUSARO, et al.,

Plaintiffs,

vs.

HIALEAH HOUSING AUTHORITY,

Defendant.

_____/

ORDER

(Filed Jan. 11, 1999)

THIS CAUSE came before the Court upon Defendant Hialeah Housing Authority's Motion for Summary Judgment (DE # 106) and Supplemental Motion for Summary Judgment (DE # 129).

UPON CONSIDERATION of the motions, responses, materials submitted, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

BACKGROUND

Plaintiffs Richard Fusaro, Hugo Hernandez and Roberto Jimenez ("Plaintiffs") filed a 24-count complaint against the Hialeah Housing Authority (the "Authority") and Executive Director Maria Roca ("Roca") alleging violations of Title VII, the Age Discrimination in Employment Act ("ADEA"), procedural and substantive due

process (pursuant to 42 U.S.C. § 1983) and the Florida Civil Rights Act.[1]

STATEMENT OF FACTS[2]

The following facts are undisputed for purposes of ruling on the instant motion: Fusaro began working with the Authority in January 1980. In March 1994, Fusaro initiated contact with federal agents who were investigating allegations of mismanagement and misappropriation by the Authority's then-executive director Rafael Sanchez. In November 1995, Sanchez was suspended from his position and the Authority's Board of Commissioners (the "Board") voted Fusaro as acting executive director of the Authority. In December 1995, Roca resigned her position on the Authority's Board and was appointed to replace Fusaro as acting executive director. At that time, Fusaro was reassigned to his former position as Director of Operations. Fusaro alleges that after Roca became acting executive director, he was continually subject to reprimands (verbal and written) for alleged disobedience and nonperformance. On November 13, 1996, Fusaro was terminated from his employment with the Authority. Fusaro

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[1] By Order dated October 19, 1998, the Court granted the Authority's motion for partial summary judgment as to those counts of Plaintiffs' complaint alleging violations of the Florida Civil Rights Act. By Order dated December 10, 1998, the Court granted Maria Roca's motion for summary judgment based on qualified immunity and dismissed her as a defendant in this action.

[2] The facts provided here relate to the instant motion. Additional facts may be found in this Court's Orders dated October 19, 1998 and December 10, 1998.

alleges his demotion and termination were discriminatory and in retaliation for Fusaro's assistance in the Sanchez investigation. In December 1996, Roca became the permanent executive director of the Authority.

Hernandez and Jimenez began working in the Authority's maintenance department in 1982 and 1975, respectively. In January 1996, Hernandez and Jimenez and several other employees signed a letter of protest (the "Letter") addressed to the United States Department of Housing and Urban Development in which they objected to the operation of the Authority and the Authority's alleged poor treatment of Fusaro. On November 26, 1996, following the completion of an inventory and audit of their department, Hernandez and Jimenez each were terminated from their employment with the Authority. Hernandez and Jimenez allege, among other things, they were terminated in retaliation for their protest letter and for voicing other matters of public concern.

DISCUSSION

I. Summary Judgment Standard

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment may be entered only where there is no genuine issue of material fact. *See Twiss v. Kury*, 25 F.3d 1551, 1554 (11th Cir. 1994). The moving party has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Id.*

In applying this standard, the district court must view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Id.* However, the non-moving party:

> may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Rule 56(e), Fed. R. Civ. P. "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In other words, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Company v. Zenith Radio*, 475 U.S. 574, 586 (1986).

Additionally, the non-moving party must "make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. *Id.*

II. Burden of Proof

The burden of proof in a Title VII or ADEA action is set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013 (11th Cir. 1994). Initially, the plaintiff must establish a prima facie case of discrimination. Once a plaintiff establishes a prima facie case, a presumption of discrimination arises. *Hicks*, 509 U.S. at 506. Thereafter, the defendant can rebut any presumption by producing a legitimate, nondiscriminatory reason for its actions. *Id.* This burden is "exceedingly light"; the defendant must merely proffer the legitimate reasons, not prove them. *Meeks*, 15 F.3d at 1019. Once such a reason is proffered, the plaintiff must then demonstrate the reasons were simply a pretext and the defendant had a discriminatory intent. Because the plaintiff bears the burden of establishing pretext, he must present "significantly probative evidence on the issue to avoid summary judgment." *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 444 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2511 (1997). Thus, "a mere scintilla of evidence does not create a jury question." *Id.* (quoting *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989)). That a plaintiff calls into

question some assertions made by defendant in support of defendant's justification is not enough; a plaintiff must call into question the veracity of defendant's ultimate justification itself. *Id.* Based on the standards set forth above, the Court will address each Plaintiff's allegations in turn.

A. Fusaro's Claims of Retaliation and Discrimination Based on National Origin and Age (Counts I And II)

In Count I of the second amended complaint, Fusaro alleges he was subjected to unlawful discrimination and retaliation based on his national origin. In Count II, Fusaro alleges he was discriminated against on the basis of his age.

For purposes of this discussion, the Court will assume Fusaro has stated prima facie cases for national origin[3] and age discrimination[4] and

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[3] A plaintiff may establish a prima facie case for national origin discrimination by showing (1) he was a member of a protected class, (2) he was qualified for the position held, (3) adverse employment action occurred and (4) he was replaced by a person outside the protected class. *Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1073 (11th Cir. 1998).

[4] A plaintiff may establish a prima facie case for age discrimination by showing (1) he was a member of a protected group of persons between the ages of forty and seventy, (2) he was subject to adverse employment action, (3) that a substantially younger person filled the position from which he was discharged and (4) that he was qualified for the position. *Turlington v. Atlanta Gas & Light Co.*, 135 F.3d 1428, 1432 (11th Cir.), *cert. denied*, 119 S.Ct. 405 (1998).

retaliation.[5] The Authority argues, however, it had a legitimate, nondiscriminatory reason for terminating Fusaro – his inadequate performance as Director of Operations. Thus, Fusaro now has the burden of producing evidence to show the Authority's reason for terminating his employment was simply a pretext for intentional discrimination.

With respect to Fusaro's claim for age discrimination, Fusaro provides no evidence other than he was replaced by a younger person. This evidence is part of Fusaro's prima facie case and cannot be used to rebut the Authority's legitimate, nondiscriminatory reason for his termination. *See Tidwell v. Carter Products*, 135 F.3d 1422, 1426 (11th Cir. 1998) (plaintiff must provide a prima facie case *plus* evidence discrediting the employer's reasons to survive a motion for summary judgment). In his affidavit in support of his argument, Fusaro states "I firmly believe that I have been discriminated against based on my age and national origin, because I was replaced as Acting Executive Director by a younger Hispanic female who was less qualified than I to run the Authority." Fusaro,

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[5] A plaintiff alleging a retaliatory claim under Title VII must show that (1) he engaged in a statutorily protected activity, (2) an adverse employment action occurred and (3) the adverse action was causally related to the plaintiff's protected activities. *Little v. United Technologies*, 103 F.3d 956, 959 (11th Cir. 1997); *Coutu*, 47 F.3d at 1074. The parties dispute whether Fusaro engaged in a statutorily protected activity (i.e. assisting in the FBI investigation) prior to his termination. The Court is assuming for purposes of this discussion that Fusaro has stated a prima facie case of retaliation and thus need not address this disputed issue.

however, provides no additional supporting factual evidence for this statement. Conclusory statements in an affidavit are not sufficient evidence to prove age discrimination. *See Red Mendoza v. Borden, Inc.*, 158 F.3d 1171, 1174 (11th Cir. 1998). In addition, when asked in a deposition whether there were any reasons *other* than retaliation and national origin that caused his termination at the Authority, Fusaro replied "no."

The evidence is similarly lacking with respect to Fusaro's claim for discrimination based on national origin. The sole evidence Fusaro presents to support his claim for discrimination based on national origin is the composition and ethnicity of the Board. In the same deposition, the following exchange took place:

Q: Sir, is it simply your opinion that you are out of work because Maria Roca and Hialeah Housing board members retaliated against you?

Fusaro: I believe so.

Q: Is that a yes, sir?

Fusaro: Yes.

Q: What evidence or indication do you have, sir, that you were discriminated against?

Fusaro: Well the fact that all the board members are Hispanic except for one and she just votes along with the pack, and the executive director is Hispanic.

. . .

Q: Do you have any evidence or indication that the support for which you refer the board as

having for the executive director [Maria Roca] was based on national origin?

Fusaro: Do I have any evidence? You are talking about other than my opinion?

Q: Yes.

Fusaro: No.

Q: Do you have any evidence other than your own opinion, sir, that you were discriminated against based on national origin?

Fusaro: No.

Finally, with respect to Fusaro's claim for retaliation, the Court finds Fusaro has not met his burden of producing "significantly probative evidence" that the Authority was acting with discriminatory intent. There is ample evidence in the record concerning incidents of Fusaro's substandard performance. In fact, Fusaro admits to committing a series of mistakes with respect to a bidding process he oversaw.[6] Finally, as with his claims for

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[6] With respect to the particular incident involving the bidding process, Fusaro argues the Authority has failed to provide any substantive evidence that his mistakes warranted the extreme sanction of termination. Fusaro, however, misconstrues the burden of production. Because the Authority has rebutted the presumption of discrimination by providing a legitimate, nondiscriminatory reason for Fusaro's termination, it is *Fusaro* – not the Authority – who now must provide "significantly probative evidence on the issue to avoid summary judgment." *Isenbergh*, 97 F.3d at 444. As discussed herein, Fusaro has failed to meet that burden. Furthermore, simply disagreeing with an employer's decision is not sufficient evidence to prove pretext. *Tidwell*, 135 F.3d at 1427 ("A plaintiff may not establish that an employer's proffered reason is

discrimination, Fusaro has testified that in his *opinion*, he was retaliated against. Clearly, "[c]onclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, nondiscriminatory reasons for its actions." *Isenbergh*, 97 F.3d at 444. Because the Court finds Fusaro has not provided sufficient evidence to rebut the legitimate, nondiscriminatory reason proffered by the Authority for his termination, summary judgment in favor of the Authority is appropriate with respect to Fusaro's claims for national origin and age discrimination and retaliation.[7]

B. Plaintiffs' Claims for Denial of Procedural Due Process (Counts III, XII and XX)

Plaintiffs collectively argue the termination of their employment violated their constitutional rights to due process, including a notice and hearing. A procedural due process violation occurs when a state fails to provide due process. *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994). Thus, only when the state "refuses to provide a

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pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.").

[7] In Count V of the second amended complaint, Fusaro raises another retaliation claim pursuant to 42 U.S.C. § 1983 based on the exercise of his First Amendment right to free speech. His allegations are virtually identical to the other retaliation claims brought under Title VIII and the ADEA and thus the Court's analysis with respect to those claims is applicable to Fusaro's First Amendment claims.

process sufficient to remedy the procedural deprivation does a constitutional violation actionable under § 1983 arise." *Id.* It is undisputed the only action Plaintiffs took following their terminations was to file charges with the EEOC. Plaintiffs argue, however, the grievance procedure at the Authority is facially defective and would have been futile because the first two steps of the procedure involved filing grievances with Roca (Plaintiffs' supervisor and the Executive Director), whom Plaintiffs argue unlawfully terminated their employment in the first place.[8] Plaintiffs, however, provide no evidence other than their personal feelings that the grievance procedure would have been biased. Nevertheless, even if there were evidence of bias on the Board, the result is not necessarily a violation of due process. *Id.* at 1563. It is only when a state refuses to provide a means to correct any error resulting from such bias that a procedural due process violation would occur. *Id.* Here, Plaintiffs failed to take any action with respect to both internal Authority remedies and any other state remedies. Because the Court finds Plaintiffs "failed to avail themselves of [the grievance] procedure and presented no evidence that resort to it would have been futile," *see Maples v. Martin*, 858 F.2d 1546, 1551 (11th Cir. 1988), summary judgment in favor of the Authority is appropriate with respect to Plaintiffs' procedural due process claims.

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[8] The grievance procedure at the Authority consists of first filing a grievance with the employee's supervisor, then with the Executive Director and finally with the Board, whose decision is final and binding.

C. Plaintiffs' Claims for Denial of Substantive Due Process (Counts IV, XIII and XXI)

Plaintiffs argue they were retaliated against for engaging in protected free speech based on a custom or policy by which the Authority retaliates against individuals who speak out against the Authority. Thus, plaintiffs argue the Authority violated their substantive due process rights in violation of 42 U.S.C. § 1983. It is well-established law that a governmental entity may not be held liable for violations of 42 U.S.C. § 1983 based on a theory of respondeat superior. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Thus, governmental entities may only be held liable "when, and only when, their official policies cause their employees to violate another person's constitutional rights." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988). Thus, a plaintiff must establish a "widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law.'" *Id.* at 127 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)). Furthermore, the authority to make municipal policy is necessarily the authority to make *final* policy and "if the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the [governmental entity] because their decision was final." *Id.*

Here, it is undisputed there is no official written policy or custom of the Authority to retaliate against

employees who exercise free speech.[9] Plaintiffs argue, however, there is an "unwritten custom or policy of retaliation against employees who dare exercise free speech that is critical of perceived abuses." In support of their argument, Plaintiffs point to (1) comments made by Roca, Orlando Prendes (Roca's assistant) and Omar Barrera (the Authority's Finance Director) concerning the Letter and certain retaliatory actions they would take and (2) the termination of seven employees who signed the Letter. Plaintiffs' argument fail on both counts.

First, the policymaker for the Authority is the Board, not Roca or any other supervisor. There is no evidence the comments allegedly made by Roca, Prendes and Barrera were authorized, adopted, endorsed or ratified by the Board. As stated earlier, a governmental entity cannot be held liable on the basis of respondeat superior and there is no basis to impute the alleged comments of Roca, Prendes and Barrera to the Board. *See Monell.*

With respect to the individuals terminated by the Authority, Plaintiffs still fall short of establishing a policy or custom of retaliation. Approximately 50 employees signed the Letter. Of that number, seven were terminated. In support of their argument, Plaintiffs submit the affidavits of four former employees of the Authority, Maria Vega, Felix Caceres, Violeta Lazo and Zaida Garcia. All four affidavits contain the following statements:

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[9] In fact, the Authority has a written policy that specifically states that no employee shall be discriminated against (or favored) based on their political beliefs or for expressing their opinion on political subjects.

> "Based on my experience and observations, I witnessed many instances where the Housing Authority retaliated against those employees who dared to express concerns or disagreement with the policies and management of the Housing Authority or to voice opposition to the widespread corruption. The Housing Authority enforced an unwritten rule of retribution, either through harassment, discipline, demotion or outright termination of those persons who fell out of favor with its management due to their expressed opposition to the Authority's unlawful practices, abuses of power and due to their political affiliation."
>
> "I know of at least ten other employees who have either been terminated or gradually forced out of their jobs by the Authority due (at least in part) to their having signed the January 16, 1996 protest letter or otherwise expressing their opposition or disagreement with mismanagement and abuses of power at the Authority . . . "

Both Plaintiffs and the affiants, however, fail to provide any support for these statements aside from the conclusory allegations themselves. The termination of seven employees[10] is insufficient evidence to establish a custom or policy. In addition, there is no evidence any of

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[10] With respect to the four affiants, Zaida Garcia was terminated on August 5, 1997, Felix Caceres was terminated on October 31, 1997 and Violeta Lazo was terminated on January 23, 1998. Maria Vega does not state a termination date and thus the Court assumes she left the Authority voluntarily. The Court notes the dates of termination, the earliest some 18 months after the Letter was signed, as further evidence that a custom or policy to terminate those individuals who expressed their views did not exist.

the employees sought review of their terminations by the Board. Therefore, there is no evidence the Board adopted or ratified Roca's decisions. Finally, the Court notes that eleven employees who signed the Letter have since been promoted. Based on the foregoing, the Court finds Plaintiffs have failed to provide sufficient factual evidence to establish the existence of a widespread custom or policy under which the Authority retaliates against those individuals who express their views. Accordingly, summary judgment in favor of the Authority is appropriate with respect to Plaintiffs' claims under 42 U.S.C. § 1983.

D. Hernandez's and Jimenez's Claims for Retaliation (Counts X, XI, XVII and XIX)

Hernandez and Jimenez allege their terminations were in retaliation for signing the Letter in January 1996. As stated earlier, to establish a prima facie case of retaliation, Hernandez and Jimenez must show: (1) they engaged in a protected activity (i.e. signing a letter of protest); (2) they suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. *Meeks,* 15 F.3d at 1021. The Authority argues Hernandez and Jimenez cannot prove either the first or third elements of their prima facie case.

Initially, the Authority argues that signing the Letter was not protected activity. A plaintiff engages in a statutorily protected activity when he or she protests an employer's conduct which is actually lawful, so long as the plaintiff demonstrates a "good faith, reasonable belief that the employer was engaged in unlawful employment

practices." *Little*, 103 F.3d at 960. The plaintiff's burden under this standard is twofold: he "must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented." *Id.*

The Letter contained the following language concerning Fusaro:

> "Since the departure of Mr. Sanchez, the Mayor has engaged in a constant and personal battle against the interim Executive Director Mr. Richard Fussaro [sic], to the point of attacking him and replacing members of the Executive Board with friends and political allies of himself and Mr. Sanchez."
>
> "Interim Hialeah Housing Authority Executive Director, Richard Fussaro's honest and sincere attempts to restore dignity and respect among the employees has been resisted by the Mayor's and Mr. Sanchez's constant involvement and intervention of the Hialeah Housing Authority affairs."
>
> "Mr. Richard Fussaro has been in the Hialeah Housing Authority for the past 17 years. He is a neutral party who is both capable and qualified to run the Housing Authority until such time as the fate of Mr. Sanchez is decided. However, he is under personal attack by Mayor Raul Martinez and his friends who are attempting to cover up Mr. Sanchez's abuse of power and manipulation . . . "

Although the Court recognizes that informal complaints of discrimination may be protected activity in

certain cases, *see Rollins v. State of Florida Dep't of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989), the Court finds the Letter in this case does not constitute protected activity. The gravamen of establishing a protected activity is complaining of unlawful *employment* practices, i.e. discrimination. Here, the Letter makes no mention of either national origin or age discrimination with respect to Fusaro. The Letter does not mention Fusaro was non-Hispanic or that Maria Roca was Hispanic. Although Hernandez and Jimenez now state in their affidavits and depositions they were sending the letter to oppose the Authority's demotion of Fusaro and his replacement by Roca, "a less qualified Hispanic, based on his national origin," the Letter itself does not support these statements. Furthermore, Hernandez and Jimenez admit the letter "was primarily opposed to fiscal mismanagement and abuses of power at the Authority and secondarily concerned with Fusaro's demotion." Thus, because the Court finds the letter was not protesting any unlawful employment practice within the scope of Title VII or the ADEA, the Court finds Hernandez and Jimenez did not engage in a protected activity when signing the Letter. *See Coutu*, 47 F.3d at 1074 ("Unfair treatment, absent discrimination based on race, sex or national origin, is *not* an unlawful employment practice under Title VII."). Accordingly, Hernandez and Jimenez have failed to establish the first element of a prima facie case of retaliation. As such, the Court need not analyze the remaining elements and summary judgment in favor of the Authority is appropriate with respect to Hernandez's and Jimenez's retaliation claims.

E. Hernandez's and Jimenez's Claims for Age Discrimination (Counts X and XVII)

Hernandez and Jimenez also allege the authority discriminated against them on the basis of their age. The Authority admits for purposes of their argument that Hernandez and Jimenez have stated prima facie cases of age discrimination but argues they cannot rebut the Authority's legitimate, nondiscriminatory reasons for their termination – the results of the November 1996 public housing warehouse audit. As stated above, because the plaintiff bears the burden of establishing pretext, he must present "significantly probative evidence" on the issue to avoid summary judgment. *Isenbergh*, 97 F.3d at 444.

Hernandez and Jimenez fail to meet this burden. Hernandez has offered no additional evidence of age discrimination aside from the fact he was replaced by a younger person. This evidence is part of the prima facie case and cannot be used to rebut the Authority's legitimate, nondiscriminatory reason for his termination. *See Tidwell*, 135 F.3d at 1426 (plaintiff must provide a prima facie case *plus* evidence discrediting the employer's reasons to survive a motion for summary judgment). Furthermore, when questioned in his deposition as to his basis for his age discrimination claim, Hernandez replied it was "just his opinion." Jimenez also provides no additional evidence of age discrimination. Hernandez and Jimenez primarily argue the procedures for the November 1996 inventory were purposely changed to "set-up" Jimenez and Hernandez for failure to give the Authority a basis to terminate their employment. Hernandez and

Jimenez fail again, however, to provide factual support for these conclusory statements.

As stated earlier, conclusory allegations of discrimination are not sufficient to raise an inference of pretext or intentional discrimination where a defendant has offered extensive evidence of legitimate, nondiscriminatory reasons for its actions. *Isenbergh*, 97 F.3d at 444. The evidence presented by Hernandez and Jimenez consists primarily of unsupported opinions and "unverifiable, anecdotal testimony." *See Bogle v. Orange County Board of County Com'rs*, 1998 WL 850244 (11th Cir. Dec. 9, 1998). There is no evidence presented by either Hernandez or Jimenez that a similarly situated younger employee might have been treated differently. *Id.* The Court finds Hernandez and Jimenez have failed to provide sufficient evidence to allow a factfinder to disbelieve the Authority's proffered explanation for its actions. Based on the foregoing, summary judgment in favor of the Authority is appropriate with respect to Hernandez's and Jimenez's claims for discrimination under the ADEA.

CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED that the Authority's Motion for Summary Judgment is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of January, 1999.

/s/ K. Michael Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: J.B. Harris, Esq.
Edward G. Guedes, Esq.
Nicolas A. Manzini, Esq.

APPENDIX D

FOR THE ELEVENTH CIRCUIT

No. 99-4155-FF

RICHARD FUSARO, HUGO HERNANDEZ, ROBERTO, JIMENEZ,

Plaintiffs-Appellants,

versus

THE HIALEAH HOUSING AUTHORITY, a political subdivision of the City of Hialeah, MARIA ROCA, an individual,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

(Filed Mar. 08, 2001)

Before: EDMONDSON, BARKETT and RONEY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE